THE FEDERAL LAW ENFORCEMENT -INFORMER-

MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS AND AGENTS

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This edition of *The Informer* may be cited as "11 INFORMER 09". (The first number is the month and the last number is the year.)

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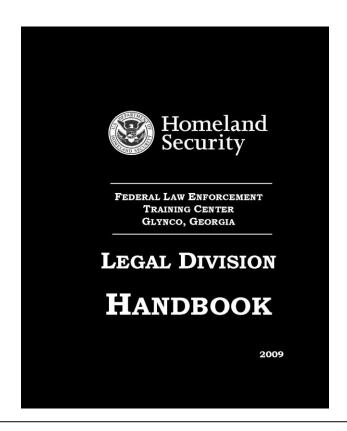
Supreme Court Preview

Our annual review of the law enforcement and criminal law cases to be decided by the Court this October 2009 term.

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2009

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Supreme Court

Law Enforcement Cases October 2009 Term

DEFENDANT STATEMENTS

Miranda

Maryland v. Shatzer

Decision below: <u>954 A.2d 1118</u> Maryland Court of Appeals

Is the <u>Edwards v. Arizona</u> prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable if, after the suspect asks for counsel, there is a break in custody or a substantial lapse in time (more than two years and six months) before commencing reinterrogation pursuant to <u>Miranda</u>?

Florida v. Powell

Decision below: 998 So.2d 531

Florida Supreme Court

Must a suspect be expressly advised of his right to counsel during custodial interrogation?

If so, does the failure to provide express advice of the *right to the presence of counsel during questioning* vitiate <u>Miranda</u> warnings which advise of both (a) the right to talk to a lawyer "before questioning" and (b) the "right to use" the right to consult a lawyer "at any time" during questioning?

Berghuis v. Thompson

Decision below: 547 F.3d 572

6th Circuit

Does the <u>Miranda</u> rule prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them?

HONEST SERVICES FRAUD

Black v. United States

Decision below: 530 F.3d 596

7th Circuit

Does 18 U.S.C. § 1346, which defines "scheme to defraud" to include depriving "another of the intangible right to honest services," apply to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to the private party to whom honest services were owed?

Weyhrauch v. United States
Decision below: 548 F.3d 1237

9th Circuit

In order to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§1341 and 1346), does the government have to prove that the defendant violated a disclosure duty imposed by state law?

Skilling v. United States

Decision below: 554 F.3d 529

5th Circuit

Does the federal "honest services" fraud statute, 18 U.S.C. § 1346, require the government to prove that the defendant's conduct was intended to achieve "private gain" rather than to advance the employer's interests, and, if not, whether § 1346 is unconstitutionally vague.

ARMED CAREER CRIMINAL ACT

Johnson v. United States

Decision below: 528 F.3d 1318

11th Circuit

Is a holding by a state's highest court that a given offense of that state does not have as an element the use or threatened use of physical force binding on federal courts in determining whether that same offense qualifies as a "violent felony" under the federal Armed Career Criminal Act, which defines "violent felony" as, inter alia, any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another?"

Is the physical force required a de minimis touching in the sense of "Newtonian mechanics" or must the physical force required be in some way violent in nature - that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so?

United States v. O'Brien
Decision below: 542 F.3d 921

1st Circuit

Under 18 § 924(c)(1), is the sentence enhancement to a 30-year minimum when the firearm is a machinegun an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by the preponderance of the evidence?

CASE SUMMARIES

CIRCUIT COURTS OF APPEALS

2nd CIRCUIT

U.S. v. Shim, 2009 U.S. App. LEXIS 21536, October 01, 2009

The Mann Act, 18 U.S.C. § 2421, punishes "[w]hoever knowingly transports any individual in interstate . . . commerce . . . with intent that such individual engage in prostitution" "Knowingly" qualifies "interstate commerce." Therefore, the government must prove beyond a reasonable doubt, as an essential element of the offense, that the defendant knew the women were transported in interstate commerce.

Click **HERE** for the court's opinion.

U.S. v. Romero-Padilla, 2009 U.S. App. LEXIS 22020, October 07, 2009

Looking at this issue for the first time, the court decides:

Title 21 U.S.C. § 959(a) makes it "unlawful for any person to manufacture or distribute a controlled substance . . . (1) intending that such substance or chemical will be unlawfully imported into the United States . . . or (2) knowing that such substance or chemical will be

unlawfully imported into the United States. The government must prove beyond a reasonable doubt that the defendant actually knew or intended that a controlled substance he distributed or manufactured would be illegally imported into the United States. When the government does not prove the specific intent, it must prove actual (as opposed to constructive) knowledge that such substance or chemical will be unlawfully imported into the United States.

Click **HERE** for the court's opinion.

5th CIRCUIT

U.S. v. Rangel-Portillo, 2009 U.S. App. LEXIS 23608, October 27, 2009

To temporarily detain a vehicle for investigatory purposes, a Border Patrol agent on roving patrol must be aware of 'specific articulable facts' together with rational inferences from those facts, that warrant a reasonable suspicion that the vehicle is involved in illegal activities, such as transporting undocumented immigrants." "Factors (no single factor is dispositive) that may be considered include: (1) the characteristics of the area in which the vehicle is encountered; (2) the arresting agent's previous experience with criminal activity; (3) the area's proximity to the border; (4) the usual traffic patterns on the road; (5) information about recent illegal trafficking in aliens or narcotics in the area; (6) the appearance of the vehicle; (7) the driver's behavior; and, (8) the passengers' number, appearance and behavior."

Proximity of the stop to the border (in this case a mere 500 yards) is afforded great weight, but this factor alone does not constitute reasonable suspicion to stop.

Factual conditions, such as wearing seatbelts, sitting rigidly, refraining from talking to one another, and having no shopping bags when leaving Wal-Mart (even when consistent with alien smuggling), do not provide reasonable suspicion if those conditions also occur even more frequently in the law-abiding public.

Whether a driver looks at an officer or fails to look at an officer, taken alone or in combination with other factors, should be accorded little weight.

Reasonable suspicion cannot result from the simple fact that two cars are traveling on a roadway or exiting a parking lot, one in front of the other, unless there are other "connecting factors" to establish that their simultaneous travel could rationally be considered suspicious.

In cases that present no evidence of erratic driving, no features on the defendant's vehicle that would make it a likely mode of transportation for illegal aliens, and no tips by informants, this Court has been quite reluctant to conclude a stop was based on reasonable suspicion.

Click **HERE** for the court's opinion.

6th CIRCUIT

U.S. v. Quinney, 2009 U.S. App. LEXIS 21635, October 01, 2009

Under the inevitable-discovery doctrine, if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, then the deterrence rationale of the exclusionary rule has so little basis that the evidence should be received. See *Nix v. Williams*, 467 U.S. 431, 444 (1984). However, the inevitable-discovery doctrine does not permit police, who have probable cause to believe a home contains contraband, to enter a home illegally, conduct a warrantless search and escape the exclusionary rule on the ground that the police *could* have obtained a warrant yet chose not to do so.

Click **HERE** for the court's opinion.

8th CIRCUIT

U.S. v. Goodwin-Bey, 2009 U.S. App. LEXIS 23755, October 28, 2009

After officers received a report of an earlier incident involving occupants of a car displaying a weapon, they stopped a car of the same make, model and color. Officers arrested a passenger on an existing warrant, frisked the other three occupants, and then searched the passenger compartment. After getting the key from the driver, they found a handgun in the locked glove box.

The earlier incident report, along with the number of the vehicle's unsecured occupants, sufficiently implicated officer safety concerns to justify a search of the passenger compartment incident to arrest.

The earlier incident report also provided a reasonable suspicion that there was a weapon in the vehicle that the unsecured occupants could immediately access. Even if the search incident to arrest exception did not apply, these same concerns for officer safety would justify a <u>Terry</u> frisk of the passenger compartment.

Click **HERE** for the court's opinion.

10th CIRCUIT

Bowling v. Rector, 2009 U.S. App. LEXIS 23542, October 26, 2009

To be valid under the Fourth Amendment, the search warrant must meet three requirements: (1) it must have been issued by a neutral, disinterested magistrate; (2) those seeking the warrant must have demonstrated to the magistrate their probable cause to believe that the evidence sought would aid in a particular apprehension or conviction for a

particular offense; and (3) the warrant must particularly describe the things to be seized, as well as the place to be searched.

These requirements are satisfied where officers obtain a warrant, grounded in probable cause and phrased with sufficient particularity, from a magistrate of the relevant jurisdiction authorizing them to search a particular location, even if those officers are acting outside their jurisdiction as defined by state law.

The 8th Circuit agrees (cite omitted).

Click **HERE** for the court's opinion.

U.S. v. Johnson, 2009 U.S. App. LEXIS 23676, October 27, 2009

Looking at this issue for the first time, the court decides:

The warrantless search of the storage unit did not violate defendant's Fourth Amendment rights because he had "forfeited" any privacy rights he might have had in the storage unit by directing his girlfriend to enter into the rental agreement using another person's name and stolen identification.

While some courts have found an expectation of privacy when an individual uses an alias or a pseudonym, because of the potential harm to innocent third parties, there is a fundamental difference between merely using an alias and using another's identity.

What matters is not whether defendant might have some legitimate property interest in the storage unit but whether defendant's interest is one that the Fourth Amendment is intended to protect. "We will not be a party to the fraud by legitimizing Johnson's interest in the storage unit. Therefore, whatever subjective privacy expectations Johnson had in the storage unit were not expectations that 'society is prepared to recognize . . . as objectively reasonable."

Click **HERE** for the court's opinion.